Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

Number 76-278

WILLIAM B. JOLLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM B. JOLLEY

Petitioner, Defendant, Appellant
Pro se

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on July 2, 1976, and re-affirmed July 26, 1976.

OPINIONS BELOW

The United States District Court rendered no formal opinion.

The United States Court of Appeals rendered no formal opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1976, and reaffirmed July 26, 1976. The Jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

I Whether defendant's Constitutional rights were violated by an indictment that does not state a crime.

II Were defendant's rights violated by a three year pre-indictment delay which was for the purpose of gaining a tactical advantage.

III Were the defendant's rights violated by prosecutorial fraud when the government attorney made an offer of employment to the defense attorney during a trial recess; and where the government did not reveal evidence bearing on the credibility of its key witness.

IV Is the law Constitutional in its application to the case at hand where no prior case law exists; and where in a proceeding under a fraud statute the indictment and findings do not allege or show any fraud, deceit or trickery.

V Were the defendant's rights violated when questions of guilt which could only be decided by speculation were presented to the jury; and where the defendant's conviction was due to his inability to prove his innocence to the satisfaction of the jury. Did the government, which failed to show that the defendant ever saw the false form, fail in its burden of proof that the defendant "used" the form.

STATEMENT OF FACTS

During February 1972 the petitioner, who was director of the Cincinnati HUD Insuring Office, was alleged by the indictment to have knowingly and willfully used a false personal financial statement in connection with his approval of an application for HUD mortgage insurance. The financial statement had been submitted by the petitioner's son-in-law. No evidence was presented that the defendant had ever seen the false form. The approval of the mortgage insurance application was done by someone other than the defendant and who did not know of the son-in-law relationship. The government's allegation of "using" the false form was supported by a notation of the defendant in the HUD file and that entry had been changed by someone else to read differently than was originally written.

The jury in the first trial was unable to reach a decision and was declared deadlocked on April 18, 1975. A second trial ended July 22, 1975 with a finding of guilty.

REASONS FOR GRANTING WRIT

I The issue of the indictment not stating a crime is one of basic Constitutional rights. The indictment here states that the defendant "used a false form in connection with his approval' of a mortgage insurance application. The indictment contains no allegation of deceitfulness which is the essence of fraud. The "use of a false form" is not necessarily a criminal act. U.S. v. CRUIKSHANK, 92 U.S. 542, holds that a crime is made of acts and intent and all the ingredients which enter into the offense must be stated. The indictment of the petitioner makes no reference to intent and it does not even define the act in a manner to allow either understanding or comprehension of what is being charged.

The interpretation of 18 USC 1001 applied in this indictment would allow prosecution for "willfully" (intentionally) and "knowingly" (with knowledge) "using" a replica of the United States Constitution (a false document) in connection with the writing of a book. It is a legal fact, with case-law precedent, that the courts and the people may refer to the dictionaries in common use to interpret the meaning of a law. It was held in *U.S.* v. *Hess*, 124 U.S. 483, that if an act does not constitute a crime under some circumstances but does under other circumstances it is not enough to charge that the act was done with intent to violate the law.

The indictment used violated the defendant's rights under both the 5th and 6th Amendments to the Constitution.

II Speedy trial questions become critical in light of 1975 legislation setting standards for post-indictment delay. Pre-indictment delay is an alternative to obtain tactical advantages.

III The question of prosecutorial misconduct is enunciated by SINGER v. U.S., 380 U.S. 24, and many other cases. The fairness and impartiality guaranteed by our national heritage can only be assured with clear and definitive responses by the judiciary whenever questionable practices are employed. The offense, and thus the trespass against the defendant's rights, when the government attorney attempted to proselytize the defense attorney with government employment, was accomplished the instant that Assistant U.S. Attorney Ralph Winkler said "Jack, why don't you come to work for me."

IV The Constitutionality of the application of law is always in question where, as with this case, there is absolutely no precedent case-law for the application. This case represents a truly novel interpretation of 18 USC 1001.

V The result of the proceedings here was a verdict based on sheer speculation and conjecture. As opposed to the 6th Circuit decision here, the 4th Circuit ruled in U.S. v. COLE, 491 F2d 1276 (1974), that a jury should not be asked to determine an issue which could only be decided in such a fashion. The decision reached is diametrically opposed to the manifest weight of the evidence. The defendant was convicted for being unable to satisfactorily prove his innocence when the correct rule of law is that the government should have been required to prove guilt beyond a reasonable doubt.

Respectfully submitted,

WILLIAM B. JOLLEY

Petitioner, Defendant, Appellant
Pro se

159 Capri Drive
Fort Thomas, Kentucky 41075

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Docket No. CR-1-74-89

UNITED STATES OF AMERICA
Plaintiff,

v.

WILLIAM B. JOLLEY,
Defendant.

JUDGMENT AND PROBATION/COMMITMENT ORDER

(Filed August 10, 1975)

In the presence of the attorney for the government the defendant appeared in person on this date — August 18, 1975.

COUNSEL: With Counsel — John W. Dressing, Esq.

PLEA: NOT GUILTY

FINDING AND JUDGMENT: GUILTY. Defendant has been convicted as charged of the offense of using a materially false, fictitious, and fraudulent "Personal Financial and Credit Statement" (F.H.A. Form 2417) and approving same in his official capacity as Director of the Cincinnati Insuring Office of the Department of Housing

and Urban Development, of a H.U.D. rehabilitation project, in violation of Title 18, Section 1001, United States Code.

SENTENCE OR PROBATION ORDER: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS under the provisions of Title 18, Section 3651, United States Code; the defendant will be confined in a jail-type institution for a period of FOUR (4) MONTHS and the exection of the remainder of the THREE YEAR sentence is suspended and the defendant is placed on probation for the remaining TWO (2) YEARS, EIGHT (8) MONTHS of this sentence.

It is adjudged that a stay of execution of this sentence is granted pending the completion of an appeal in this matter and the present Bond for the defendant is continued, pending appeal.

* * *

/s/ CARL B. RUBIN
U.S. District Judge

Date August 18, 1975.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-2483

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

WILLIAM B. JOLLEY,
Defendant-Appellant.

ORDER

(Filed July 2, 1976)

Before WEICK and EDWARDS, Circuit Judges, and GREEN*, District Judge.

Upon consideration of the record and briefs, the argument pro se of appellant and the argument of counsel for the Government, we are of the opinion that the judgment of conviction is supported by substantial evidence and that no prejudical error has intervened.

It is therefore ORDERED that the judgment of conviction be and it is hereby AFFIRMED.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN,
Clerk

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* The Honorable Ben C. Green, Senior District Judge for the Northern District of Ohio, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-2483

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

WILLIAM B. JOLLEY,
Defendant-Appellant.

ORDER

(Filed July 26, 1976)

Before WEICK and EDWARDS, Circuit Judges, and GREEN*, District Judge.

Upon consideration, it is ORDERED that the petition for rehearing be and it is hereby DENIED.

ENTERED BY ORDER OF THE COURT.

John P. Hehman, Clerk
By /s/ GRACE KELLER,
Chief Deputy

---

* The Honorable Ben C. Green, Senior District Judge for the Northern District of Ohio, sitting by designation.

CONSTITUTION OF THE UNITED STATES

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

TITLE 18 U.S.C. § 1001

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

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OCTOBER TERM, 1976

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

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In the Supreme Court of the United States

OCTOBER TERM, 1976

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of affirmance of the court of appeals (Pet. App. 3a) is reported at 538 F. 2d 330.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1976, and a petition for rehearing was denied on July 26, 1976 (Pet. App. 4a). The petition for a writ of certiorari was filed on August 24, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction.

2. Whether petitioner's indictment was fatally defective.

3. Whether pre-indictment delay denied petitioner due process of law.

4. Whether government counsel's inquiry regarding future employment of petitioner's attorney during an out-of-court conversation deprived petitioner of a fair trial.

5. Whether 18 U.S.C. 1001 is unconstitutional as applied in this case.

STATUTE INVOLVED

18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device, a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of knowingly using a false personal financial statement in a matter within the jurisdiction of the Department of Housing and Urban Development, in violation of 18 U.S.C. 1001. He was sentenced to three years' imprisonment, all but four months of which was suspended in favor of probation for two years and eight months. The court of appeals affirmed (Pet. App. 3a).

The evidence at trial showed that in 1971 petitioner was the Director of the Insuring Office of the Department of

Housing and Urban Development in Cincinnati, Ohio (Tr. 219). In the fall of 1971, petitioner's son-in-law, Gerald McClanahan, after discussions with petitioner, purchased an apartment building owned by H.U.D. for $1,000 (Tr. 25-27, 47, 53).[1] On December 1, 1971, McClanahan submitted an application for project mortgage insurance on the apartment complex, but his application was denied by H.U.D.'s Federal Housing Administration because his personal financial and credit statement listed no assets (Tr. 28-29, 50). McClanahan informed petitioner that he would have to show assets if he was to be approved as a sponsor for the project (Tr. 29-30). Petitioner then arranged a meeting between himself, McClanahan, and Thomas Tudor, who was an employee of the Leader Mortgage Company and was in charge of the company's H.U.D. division (Tr. 109, 111, 115). At petitioner's urging, a $5,000 loan from the mortgage company to McClanahan was arranged so that McClanahan could list the assets on his personal financial and credit statement (Tr. 30-33, 56, 115-117).

On January 20, 1972, the $5,000 check from Leader to McClanahan was deposited in a bank (Tr. 120). On that day, McClanahan withdrew $459.90 from the account to pay the F.H.A. application fee. The $4,540.10 remaining in the account was used on McClanahan's second financial statement to show that he had substantial cash assets (Tr. 35, 51, 104). This financial statement fraudulently failed to reflect any liabilities or debts owed by McClanahan, as required by law (Tr. 52-53; Govt. Ex. 1D). Petitioner not only was aware of this requirement and of the falsity of the

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[1] McClanahan was indicted with petitioner, but his case was subsequently severed.

financial statement but he also notified McClanahan of the procedures that H.U.D. would use to verify the financial statement (Tr. 35-36).

After submission of the false statement, the H.U.D. Mortgage Credit Department was still dissatisfied with McClanahan's finances and recommended that the project be declined (Tr. 143, 149, 193). Since the project could not go forward without petitioner's approval, the recommendation was brought to his attention (Tr. 172-175). On February 2, 1972, petitioner instructed the Mortgage Credit Department that the project was a small one which McClanahan could handle and that if evidence could be obtained to show that the money reflected on McClanahan's financial statement was actually in the bank, the project should be approved (Tr. 193-195). Petitioner made a note to this effect on the bottom of the Mortgage Credit Department's rejection memo (Tr. 194; Govt. Ex. 3B). On February 7, 1972, after the bank had verified McClanahan's assets, the project was approved and F.H.A. committed itself to a $153,000 loan (Tr. 196-197; Govt. Ex. 2B). Thereafter, on April 5, 1972, the same day as the closing on the project, the $4,582.86 balance in McClanahan's account was withdrawn and paid to the mortgage company.

ARGUMENT

1. Petitioner contends (Pet. 5) that the evidence was insufficient to support his conviction. But the evidence outlined above provided an ample basis for the jury to find that petitioner knew that McClanahan's financial statement had falsely omitted the loan from the mortgage company as a liability and that petitioner had used the financial statement to secure a loan from H.U.D. for his son-in-law. See *McClanahan* v. *United States*, 230 F. 2d 919 (C.A. 5), certiorari denied, 352 U.S. 824.

2. Petitioner contends (Pet. 3) that his indictment was fatally defective because it failed to contain an allegation of deceitfulness or intent to commit fraud. The indictment, however, expressly charged petitioner with willfully and knowingly using a document containing a materially false, fictitious, and fraudulent statement in connection with the approval by him, in his official capacity, of a H.U.D. rehabilitation project. This set forth each of the elements of the offense. Furthermore, a reading of the indictment for its clear meaning reveals that it adequately placed petitioner on notice of the charges against him, allowed him to prepare a defense, and apprised him "with accuracy to what extent he may plead a former acquittal or conviction." *Hagner* v. *United States*, 285 U.S. 427, 431.

3. Petitioner claims (Pet. 4) that his rights were violated by pre-indictment delay. This argument is couched in conclusory terms, and petitioner has neither identified prejudice from the delay nor alleged facts showing that the delay was designed to secure a tactical advantage by the government. Indeed, petitioner does not even discuss the chronology of events leading up to his indictment. He has therefore failed to demonstrate that the delay in this case violated due process of law. *United States* v. *Marion*, 404 U.S. 307.

4. Petitioner contends (Pet. 4) that he was denied a fair trial because government counsel, during a recess in the trial, asked petitioner's attorney to consider working in the United States Attorney's Office in the future. Petitioner has not alleged that this statement, which occurred outside the hearing of the judge and jury, led to the ineffective assistance of counsel or in any way affected the outcome of the trial. In these circumstances, petitioner was not prejudiced by the remark.

5. Without elaboration, petitioner claims (Pet. 5) that 18 U.S.C. 1001 is unconstitutional and that this case represents a "truly novel interpretation" of the statute. Assuming that petitioner's argument here is the same as that presented in the court of appeals—*i.e.*, that Section 1001 is unconstitutionally vague and indefinite—it is insubstantial. The statute clearly prohibits the knowing use of a false, fraudulent or fictitious document in any matter within the jurisdiction of a department or agency of the United States. As the lower courts correctly found, this language gives fair warning to a person of ordinary intelligence as to what is prohibited. Furthermore, the requirement of a knowing and willful violation prevents the possibility of punishing purely innocent conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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Assistant Attorney General.

JEROME M. FEIT,
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Attorneys.

NOVEMBER 1976.

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